

FILED BY CLERK

MAR 27 2008

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,

Appellee,

v.

THOMAS CHARLES HENRY,

Appellant.

)  
)  
) 2 CA-CR 2006-0208  
) DEPARTMENT A  
)

MEMORANDUM DECISION

)  
) Not for Publication  
) Rule 111, Rules of  
) the Supreme Court  
)  
)

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20053759

Honorable Michael J. Cruikshank, Judge

AFFIRMED

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Terry Goddard, Arizona Attorney General  
By Randall M. Howe and David A. Sullivan

Tucson  
Attorneys for Appellee

Law Office of David Alan Darby  
By David Alan Darby

Tucson  
Attorney for Appellant

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H O W A R D, Presiding Judge.

¶1 After a jury trial, appellant Thomas Henry was convicted of numerous offenses arising out of a home invasion. The trial court sentenced him to prison terms totaling fifty-six years. He raises six issues on appeal, none of which merits reversal. We therefore affirm.

## **Impeachment with Prior Convictions**

¶2 Henry first argues the trial court abused its discretion by refusing to preclude the state from using his “sanitized” prior convictions for impeachment purposes under Rule 609, Ariz. R. Evid. But Henry did not testify at trial. Our supreme court has recently reemphasized that ““a defendant must take the stand before he can challenge an adverse pretrial ruling allowing prior convictions to be admitted for impeachment purposes.”” *State v. Smyers*, 207 Ariz. 314, ¶ 15, 86 P.3d 370, 374 (2004), *quoting State v. Allie*, 147 Ariz. 320, 327, 710 P.2d 430, 437 (1985). Although Henry asks us to “revisit this rule,” we have no authority to do so. *See State v. Newnom*, 208 Ariz. 507, ¶ 8, 95 P.3d 950, 951 (App. 2004). We therefore reject this argument.

## **Motion to Sever**

¶3 Henry next contends the trial court abused its discretion by denying his motion to sever his trial from that of his codefendant, James Staples. We review the denial of a motion to sever for an abuse of discretion. *State v. Grannis*, 183 Ariz. 52, 58, 900 P.2d 1, 7 (1995). We will not find an abuse of discretion unless Henry can show ““compelling prejudice against which the trial court was unable to protect.”” *Id.*, *quoting State v. Cruz*, 137 Ariz. 541, 544, 672 P.2d 470, 473 (1983).

¶4 Henry first suggests severance was required to prevent a “rub off effect” of the evidence against Staples. *See Grannis*, 183 Ariz. at 58, 900 P.2d at 7. But he cites no evidence that would have been admissible only against Staples, but not against him in severed trials. Nor was there any evidence in the record that would have given the jurors a

less favorable impression of Staples than of Henry. *See State v. Lawton*, 144 Ariz. 547, 555, 698 P.2d 1266, 1274 (1985).

¶5 Henry also contends his mere presence defense was antagonistic to Staples's defense. But, to the extent Henry's defense at trial was mere presence, the parties' defenses were not so antagonistic as to be mutually exclusive. *See Grannis*, 183 Ariz. at 58, 900 P.2d at 7. Defenses are not mutually exclusive when, as here, "[t]he core of each defendant's defense [is] his own non-involvement." *Cruz*, 137 Ariz. at 545, 672 P.2d at 474. The jury could have believed the core of evidence offered in support of either or both defenses. *See id.* We therefore find no abuse of discretion in the trial court's ruling.

#### **Motion to Continue**

¶6 Henry next argues the trial court abused its discretion by denying his motion to continue the trial on the basis of potentially exculpatory evidence. We review the denial of a motion to continue for an abuse of discretion and resulting prejudice. *See State v. Amaya-Ruiz*, 166 Ariz. 152, 164, 800 P.2d 1260, 1272 (1990).

¶7 Henry contends that a continuance was necessary to review audiotapes of phone calls made by a jail inmate, Samuel R., that supposedly contained potentially exculpatory evidence concerning "Bobby." Claiming references to "Bobby" were references to one of the victims in this case, Henry cites a transcript of one call that was attached to a supplement to Staples's motion for new trial. But Henry did not join in that motion or present that transcript to the trial court on his own behalf. He may not properly rely on the transcript in challenging a pretrial denial of his motion to continue. Furthermore, his sole

argument on appeal is that he could have used this evidence to impeach witnesses. But a court does not abuse its discretion in denying a motion to continue when the evidence would have been used for impeachment. *See State v. Loyd*, 118 Ariz. 106, 110, 574 P.2d 1325, 1329 (App. 1978). And Henry has not shown any prejudice. Accordingly, the trial court did not abuse its discretion in denying the motion to continue.

### **Motion to Withdraw**

¶8 Henry argues the court erred by not granting his counsel’s pretrial motion to withdraw. We review a trial court’s decision on defense counsel’s motion to withdraw for an abuse of discretion. *See State v. Jones*, 185 Ariz. 471, 482, 917 P.2d 200, 211 (1996). Although “irreconcilable conflict or a completely fractured relationship” will generally warrant appointment of new counsel, “[a] single allegation of lost confidence . . . and disagreements over defense strategies do not constitute an irreconcilable conflict.” *State v. Cromwell*, 211 Ariz. 181, ¶ 29, 119 P.3d 448, 453 (2005). Even a defendant’s filing of a bar complaint is insufficient to show an irreconcilable conflict. *See State v. Henry*, 189 Ariz. 542, 549, 944 P.2d 57, 64 (1997). Here, the conflicts alleged in counsel’s motion to withdraw are a disagreement over strategy and Henry’s threat to file a bar complaint. These do not demonstrate an irreconcilable conflict and, therefore, the trial court did not abuse its discretion in denying the motion to withdraw.<sup>1</sup>

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<sup>1</sup>Henry points to the court’s decision to grant a subsequent post-trial motion to withdraw as support for his claim of error regarding the denial of the first motion. But the grounds for the second motion were different and involved events that took place after the trial was over. Thus, the court could not have considered these grounds when deciding the first motion.

### **Sufficiency of the Evidence**

¶9 Henry argues the trial court erred in denying his motion for judgment of acquittal urged pursuant to Rule 20, Ariz. R. Crim. P. When considering claims of insufficient evidence, “we view the evidence in the light most favorable to sustaining the verdict and reverse only if no substantial evidence supports the conviction.” *State v. Pena*, 209 Ariz. 503, ¶ 7, 104 P.3d 873, 875 (App. 2005). “Evidence may be direct or circumstantial, but if reasonable minds can differ on inferences to be drawn therefrom, the case must be submitted to the jury.” *State v. Landrigan*, 176 Ariz. 1, 4, 859 P.2d 111, 114 (1993) (citation omitted). The jury assesses the witnesses’ credibility. *See State v. King*, 213 Ariz. 632, ¶ 34, 146 P.3d 1274, 1282 (App. 2006).

¶10 Henry’s opening brief contains a recitation of applicable law and a few conclusory statements regarding his case, but he fails to provide any relevant record citations. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi). Henry’s sole argument on this claim appears to be that the evidence was insufficient to prove he was one of the perpetrators of the crimes at issue. But he was identified by two witnesses and was apprehended by police in the neighborhood where the home invasion occurred shortly after the incident. And the record contains substantial evidence as to all elements of the offenses. Therefore, the court did not err in denying Henry’s Rule 20 motion.

### **Motion for New Trial**

¶11 Henry last argues the court erred in not granting his motion for a new trial. He provides some applicable law and summarizes the grounds presented in his motion for new

trial,<sup>2</sup> but he provides no other record citations and fails to adequately develop any substantive argument regarding the asserted grounds. He has thus waived this issue absent fundamental error. *See State Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995); *State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989); *see also* Ariz. R. Crim. P. 31.13(c)(1)(vi).

¶12 We have reviewed each of the claims that Henry presented to the trial court as grounds for a new trial and conclude that he has failed to carry his burden to show either fundamental error or resulting prejudice. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005).

### Conclusion

¶13 For the foregoing reasons, Henry's convictions and sentences are affirmed.

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JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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J. WILLIAM BRAMMER, JR., Judge

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<sup>2</sup>Henry cites the motion for new trial filed by his counsel as well as a motion that he filed pro se. But the trial court heard and ruled only on the motion filed by counsel, and we therefore consider on appeal only the grounds raised in that motion.